

CAUSE NO. _____

ADAM PEAVY and ADAM PEAVY,
P.C.,
Plaintiffs,

vs.

FLOYD KENNETH BAILEY, JR and
KENNETH CAMP BAILEY
Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

JUDICIAL DISTRICT

ORIGINAL PETITION OF PLAINTIFFS ADAM PEAVY AND ADAM PEAVY, PC

Comes now Plaintiffs Adam Peavy and his solely owned entity, Adam Peavy, PC (collectively hereinafter referred to as “Peavy”), and file this Petition asserting claims and seeking recovery against Defendants Ken Bailey and Camp Bailey (hereinafter sometimes collectively referred to as “the Baileys”), and in support thereof, Peavy would respectfully show the Court the following:

I.

DISCOVERY CONTROL PLAN and RULE 47(c) STATEMENT

1. Discovery in this case is being conducted under Level 3 pursuant to Texas Rule of Civil Procedure 190.1.

2. Pursuant to Tex. R. Civ. P. 47(c), please be advised that Peavy seeks monetary relief over \$1,000,000.00, with additional equitable relief sought as well.

II. PARTIES

3. Adam Peavy is a Plaintiff. He is an individual residing in the State of Texas, Harris County.

4. Adam Peavy, PC is a Plaintiff. It is a Texas-formed professional corporation with its principal place of business in Harris County, Texas.

5. Defendant Floyd Kenneth Bailey, Jr. (“Ken”) is an individual residing in Harris County, Texas. He may be served with process at the below address, or wherever he may be found:

Ken Bailey
56 East Broad Oaks
Houston, Texas 77056

6. Defendant Kenneth Camp Bailey (“Camp”) is an individual residing in Harris County, Texas. He may be served with process at the below address, or wherever he may be found:

Camp Bailey
5510 Tupper Lake
Houston Texas 77056

III. JURISDICTION

7. This Court has jurisdiction over the subject matter of this action, as well as general and specific personal jurisdiction over the parties. Plaintiffs’ damages are within the jurisdictional limits of the Court.

IV. VENUE

8. Venue is proper in this Court because all or a substantial part of the events or omissions giving rise to the claims asserted herein occurred in Harris County, Texas, and because Defendants currently reside in Harris County.

V.
BACKGROUND FACTS

9. This proceeding involves claims that the Baileys cheated Adam Peavy out of millions of fees owed under various agreements with the Baileys—joining a list of other lawyers whom the Baileys have cheated out of fees, despite having an agreement to pay.

10. *The Baileys' Foray into the Paxil Litigation without Comparable Litigation Experience.* On April 4, 2007, the Baileys entered into a joint venture agreement for the Paxil litigation with Clayton Clark, a well-known and experienced pharmaceutical attorney. The joint venture agreement provided that the Bailey and Clark would share litigation responsibility and cost on a 50%-50% basis, as reflected below:

April 4, 2007

Via Hand Delivery

Ken Bailey
Bailey Perrin & Bailey, LLP
440 Louisiana St., Ste. 2100
Houston, TX 77002

Re: Paxil Agreement

Dear Ken:

The following is our agreement to work together on Paxil ad campaign and litigation. Our agreement to obtain and handle these cases is as follows:

1. Bailey reimburses or pays directly for Paxil advertising costs.
2. Bailey/Clark firms share workload of ordering medical/proof of Paxil use, etc.
3. Bailey/Clark firms share responsibilities of litigation and costs on a 50/50 basis.
4. Bailey and Clark split attorney fees 50/50, net of local counsel fee, MDL fee, if any.
5. All advertised and referred cases from any source are controlled by this agreement.

This was a wholesale agreement for the Paxil litigation as a predicate for joint investment in advertising and working up the tort—it had no discrete limitation as to time or case, but rather upon agreement and investment applied to any and all Paxil cases involving the Baileys and Clark.¹

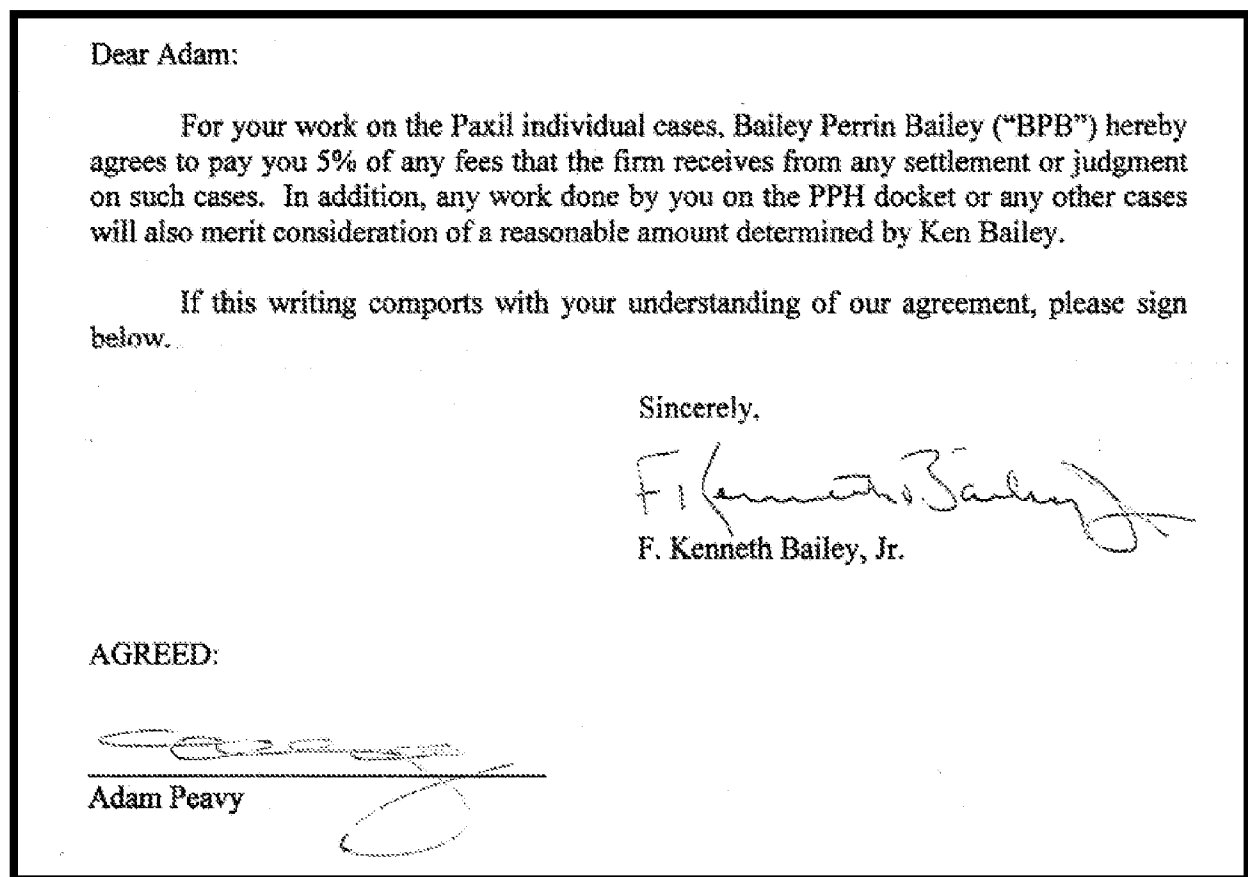
11. ***Shortly after beginning this Paxil joint venture, it became apparent to Clark that the Baileys needed experienced litigation help to work up the case.*** The Baileys’ current website promotes their capabilities as litigation savvy: “We are trial-ready because we believe the courtroom is often the only place where an individual can face a multi-billion-dollar corporation on a level playing field.” See <https://www.bchlaw.com/meet-the-firm/>. But with respect to the burgeoning Paxil litigation, this was an area where the Baileys really needed tort-specific pharmaceutical litigation help, especially a trial-ready counsel.

12. In the beginning, Clark and his firm were taking the laboring oar in working up the litigation, including the most significant chore of developing general causation evidence and theories and engaging experts for the tort as a whole. Meanwhile, the Baileys were doing very little

¹ The Baileys cannot retrade this joint venture agreement or rewrite it to include provisions that were not negotiated by the parties, that would be more favorable for him or result in a windfall. See *Addicks Services, Inc. v. GGP-Bridgeland, LP*, 596 F.3d 286, 297 (5th Cir. 2010) (“Addicks asks us to turn back the clock and insert exceptions where it failed to do so; however, Texas law forbids us from granting that request.”); *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) (“We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.”); *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 541 (Tex. App.—Texarkana 2005, no pet.) (“Like any other agreement, a release is subject to ... the tenet that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.”). For example, in *M.D. Mark, Inc. v. Nuevo Energy Co.*, 988 S.W.2d 463, 465 (Tex. App.—Houston [1 Dist.] 1999, no pet.), the court stressed that while the parties could have contractually bargained to address a different situation, the court would not imply restraints or conditions on a sale of stock that had not been agreed to by the parties. *Id.* This type of second-guessing, or re-trading an agreement, was rejected by the Texas Supreme Court in *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640 (Tex. 1996). For example, example, the Baileys cannot rewrite this joint venture agreement to suggest that there is some distinction or limitation between any so-called “Round 1” or “Round 2” of the Paxil litigation.

to advance the merits of the litigation. Clark then suggested that they bring on an experienced pharmaceutical litigator whom defendants would know could try cases and manage pharmaceutical litigation. Clark highly recommended Adam Peavy, who already had extensive experience in this type of litigation. In fact, in a short period of time Peavy brought in over a dozen Paxil cases that would be profitable.

13. *In 2008, Adam Peavy is brought in by the Baileys as the handling attorney for the Paxil litigation, with a 5% gross recovery payout.* On March 6, 2008, the Baileys entered into an agreement with Adam Peavy where he would be paid 5%—gross—of any fees that the Baileys and their firm obtained, whether by settlement or judgment. This agreement is below:



Of note, the agreement applied to any fees recovered by the firm in gross, without offset or deduction for expense or overhead. If the Baileys had wanted to impose this restrictive term on

compensation, they could have negotiated that, but did not, and cannot do so now.² In any event, the Bailey repeatedly made it clear to Peavy that compensation applied to the gross recovery of fees, and that his compensation would be “taken off the top.”

14. ***Peavy took charge of the Paxil litigation, while the Baileys did nothing.*** After signing this agreement, Peavy took over complete control of the docket for the Baileys’ side of the Paxil joint venture, and over the next few years, he did the bulk of the litigation work for the joint venture. He reviewed medical records, filed cases, served discovery, challenged privilege logs, analyzed the manufacturer’s various databases, met with and retained countless experts in variety of fields and took liability/case specific depositions. Peavy flew all over the world preparing for, attending and taking depositions, and he personally reviewed millions of pages of documents. Peavy organized and created a master exhibit list, deposition cuts, and prepared substantive briefing. Meanwhile, the Baileys did nothing. They never attended a hearing, deposition, client meeting, trial or settlement meeting.

15. ***Peavy was involved in the first Paxil trial—and won.*** After a few years of extensive litigation, the first case was set for trial on September 9, 2009, Peavy was one of three lawyers chosen to be on the trial team, including a partner from the Clark firm. A favorable, multi-million-dollar verdict was obtained after a three-week trial—a test case. The Baileys had no involvement; they did not so much as bother to show up and watch as money was being made for them.

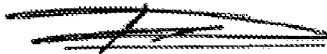
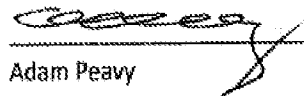
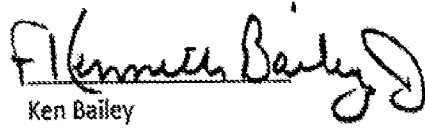
² *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) (“We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.”).

16. *Recognizing Peavy's importance to the litigation, Clayton Clark and the Baileys agree to give Peavy an additional 6 2/3% interest in a small subset of cases set for trial.* After the first verdict, the defendant was still not quite ready to settle, and the joint venture faced litigation pending all over the United States. As an additional incentive, Clark and the Baileys executed a joint venture agreement with Peavy to pay an additional 6 2/3% recovery for a smaller subset of 10 cases that were set for trial next.³ This March 2010 joint venture agreement is reflected below:

The terms of the Joint Venture agreement on the above listed cases are as follows;

1. Adam Peavy shall assist in the workup and preparation for trial and/or settlement of each of the above listed cases.
2. Adam Peavy shall be paid 6 2/3 percent of the attorneys' fees on the above listed cases.
3. Adam Peavy's attorney fee percentage shall be calculated net of local counsel fees, trial counsel fees and referral counsel fees.
4. Once local counsel fees, trial counsel fees, and referral counsel fees have been paid, Adam Peavy will be paid 6 2/3 percent of the amounts due to Clark and Bailey Law firms.
5. Adam Peavy's attorney fee percentage shall not be reduced by any advertising, marketing or overhead costs that the Clark and Bailey firms have incurred.
6. Adam Peavy attorney fees shall not be reduced by any fees owed by Clark and Bailey firms to their staff, lawyer associates or partners.

Adam Peavy fees shall not be reduced by any other bonuses the Bailey or Clark firms pay to staff or other employees.

 Clayton Clark Clark Dean Burnett	 Adam Peavy Attorney	 Ken Bailey Bailey Perrin & Bailey
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³ Of course, a joint venture is equivalent to a partnership with the same fiduciary duties imposed on a partnership. A joint venture is generally governed by the same principles of law as apply to partnerships. *See Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) (holding that persons engaged in a joint venture, or about to assume such relationship, owe to each other the utmost good faith and the most scrupulous honesty); *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256 (1951) (same fiduciary duty without scope of the joint venture). Notably, this joint venture relationship would serve as a foundation for a pre-existing fiduciary relationship with the Baileys for any subsequent business deals.

17. The additional 6 2/3% fee to Peavy was to be paid jointly by Clark and the Baileys off the top, as additional compensation, and it was not to be diminished by any other fees, expenses or agreements. As part of getting ready for this next series of trials, the Baileys and Clark agreed to engage Ernest Cannon to help assist as a trial lawyer for some of these cases, with additional compensation to be owed to Cannon as co-counsel. This took a great deal of time for Peavy to work with Ernest Cannon, who was in Erath County, Texas, to get him up to speed to step into this massive mass tort litigation. Unfortunately, Cannon now finds himself wrapped up currently in litigation with the Baileys for fees he was owed for this substantial work on the Baileys' behalf.

18. *The first batch of Paxil cases settle, with Peavy to organize the cases for settlement and payment.* Subsequently, the defendant in the Paxil litigation entered into settlement discussions. Peavy and his staff were responsible for organizing all of the cases and submitting them for settlement, which included settling several hundred individual minor claims with guardianships and minor prove-ups all over the United States. Clark, in addition, provide substantial work in negotiating the settlement itself. The Baileys did nothing, other than sending emails to Clark asking when they would get their fees.

19. *A glimpse of things to come—the Baileys secretly withhold approximately 12 million in fees for which Peavy would be entitled to compensation.* After settlement, the Baileys intentionally withheld compensation to Peavy on approximately \$12 million in fee income—this only recently came to light in March 2018, when Peavy saw an email reflecting that the Baileys had misled him on the amount of the actual settlement and had intentionally omitted over \$12 million in fees that they had received. At the time of the settlement, Peavy had no clue that the Baileys misstated the amount of recovery, and they never provided any accounting to substantiate the compensation he received. This means that, in March 2018, Peavy learned that he had been cheated out of his 5% gross of the omitted \$12 million. Considering the prejudgment interest,

Peavy has been shorted (and damaged) by the Baileys for approximately \$1 million from this misdeed alone. The Baileys committed this fraud even as they were recognizing that Peavy needed to play a substantial and continuing role in their firm.

20. *The Baileys make Peavy a non-equity "Partner."* As a result of Peavy's successful and profitable work in the Paxil litigation, on August 1, 2011, the Baileys made Peavy an Income Member in Bailey Perrin Bailey, PLLC:

**MEMBER ADDENDUM
TO
COMPANY AGREEMENT OF
BAILEY PERRIN BAILEY, PLLC**

This Member Addendum ("Addendum") to the Company Agreement of Bailey Perrin Bailey, PLLC, a Texas professional limited liability company (the "Company") is entered into effective as of August 1, 2011 (the "Effective Date") between Adam D. Peavy ("Income Member") and the Company.

WHEREAS, Income Member is to become an Income Member in the Company and this Addendum shall set forth the terms and conditions under which Income Member shall be admitted as an Income Member and receive compensation from the Company.

21. Curiously, the member agreement required Peavy to ratify the company agreement, which he was not even provided:⁴

1. Joinder and Ratification of Agreement. By execution of this Addendum Income Member ratifies and joins in the Company Agreement of the Company effective December 31, 2010, as the same may be modified from time to time (the "Agreement") and this Addendum shall be a part of and shall be incorporated into the Agreement. Income Member acknowledges and agrees that he or she has been provided a copy of and has reviewed the Agreement. Capitalized terms not defined herein shall have the meanings ascribed to them in the Agreement

⁴ This is not a situation where a party did not read what he signed, and was nevertheless bound by the terms of the document he signed. Rather, this is an instance where Peavy was not provided the referenced agreement and did not sign it, and the Baileys made representations as to what that agreement would entail and provide. Moreover, as will be demonstrated later in this case, there is always a question with the Baileys as to what documents are really in effect when and what those terms really are.

22. Peavy would be paid a bonus for certain litigation, against which he would be given a draw to be offset by any bonus compensation.

23. To be clear, Peavy was still deemed an employee at this time, as his status was reflected in the agreement:

5. Status. For Federal income and employment tax purposes, Income Member shall be classified as an employee of the Company. The Company may withhold from any compensation, benefits, or amounts payable to Income Member all federal, state, city, or other taxes as may be required pursuant to any law or governmental regulation. Income Member acknowledges and agrees that this Addendum does not constitute an employment contract and Income Member's employment with the Company will be at-will as provide by state law. Income Member may refer to himself or herself as a "member" or "partner" of the Company however the use of such terms shall in no way change the right or nature of the Income Member's status with or interest in the Company.

24. *Peavy is entitled to 7% "profit" from the Paxil litigation, which is not to be offset by non-case expenses or debt.* The Baileys enticed him with the prospect of quick money, as he would get 7% of the profits from subsequent Paxil litigation:

1. Income Member shall be eligible to receive a performance bonus from the Company ("**Performance Bonus**") on certain cases the Income Member works on during the time that he or she is employed by the Company (each a "**Bonus Eligible Case**"). The Bonus Eligible Cases shall be the cases set forth below and as may be set forth in one or more Profit Sharing Addenda (described below):
 - a. Income Member shall be entitled to 7% of the Profit from the individual, personal injury plaintiff Paxil birth defect cases internally referred to by the Company as the "**Round 2 Paxil Cases**."

25. The agreement also called for payments from other, separate categories of pharmaceutical torts, as reflected below:

- b. Income Member shall be entitled to 7% of the Profit from the individual, personal injury plaintiff Zolofit birth defect cases.
- c. Income Member shall be entitled to 5% of the Profit from the individual, personal injury plaintiff Accutane digestive disorder cases.

26. The Baileys represented that the profit margin would be high, given all of the work that had been done to advance the litigation. And they said the fees would come in quickly from new cases, as the firm had already demonstrated that it could handle the Paxil litigation with favorable results.

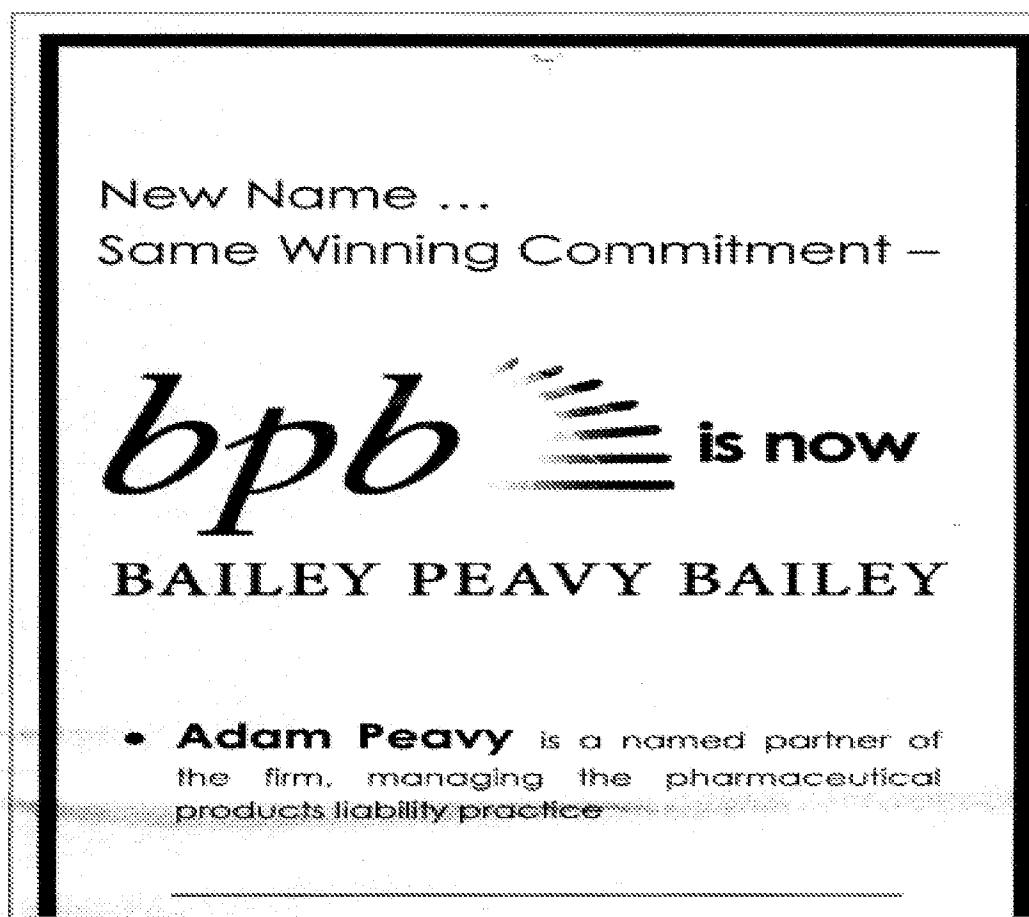
27. Moreover, the agreement spelled out the meaning of “profit,” as seen below:

- 5. **“Profit” means the Company’s collected revenue on a Bonus Eligible Case or Override Eligible Case, as applicable, minus all the Company’s direct and indirect expenses associated with the Income Member and all Bonus Eligible Cases or Override Eligible Cases including, but not limited to, taxes, insurance, the salaries and benefits of the attorneys (including Income Member), paralegals, secretaries and staff working on the cases, and an amount to cover the general operating expenses of the Company relative to all the Bonus Eligible Cases. Profit shall be determined on a cumulative basis over the life of the Bonus Eligible Cases and Override Eligible Cases and Income Member’s employment with the Company.**


28. Thus, the “profit” for determining compensation was to be done on a tort by tort basis. This meant that the entitlement to bonus, and the calculation of a bonus for Paxil cases would not be affected by the profitability or losses or expenses of other torts, such as Zolofit or Accutane cases. Moreover, the calculation of “profit” by the term of the agreement was to be **“over the life of the Bonus Eligible Cases and Override Eligible Cases and Income Member’s employment with the Company.”** *This was a critical term of the agreement. Peavy agreed to this 7% on Paxil because the Paxil litigation had already shown itself to be highly profitable, and thus there had already been more than sufficient profit to offset any future expense of the Paxil litigation over the life of Peavy’s employment with the Baileys.*

29. In addition, the determination of “profit” was limited to ordinary expenses and overhead for that tort only. The definition of “profit” would not allow the Baileys to take out tens of millions of dollars of profit and fees, through loans or otherwise, to manipulate profitability so as to affect or eliminate the amounts owed to Peavy—which is exactly what they did.

30. *As Peavy’s role expands into other torts and cases in the firm, the Baileys make him a “named” member in Bailey Peavy Bailey.* Peavy’s litigation skills and work were being recognized and extended beyond the Paxil cases into many other types of litigation involving the Baileys. In recognition, in 2013 the Baileys made Peavy a named partner, specifically a named member in the LLC, renaming the entity to reflect Peavy’s new status. This was announced publicly in 2013, including the below ad placed in a September 2013 edition of the Texas Lawyer:



31. The certificate of formation for the LLC was amended to reflect the addition of Peavy as a named member in the LLC:

Form 424 Secretary of State P.O. Box 13697 Austin, TX 78711-3697 FAX: 512/463-5709 Filing Fee: See instructions	 Certificate of Amendment	Filed in the Office of the Secretary of State of Texas Filing #: 801361295 07/12/2013 Document #: 489664430002 Image Generated Electronically for Web Filing
Entity Information		
The filing entity is a: <u>Domestic Limited Liability Company (LLC)</u>		
The name of the filing entity is: <u>Bailey Perrin Bailey, PLLC</u>		
The file number issued to the filing entity by the secretary of state is: <u>801361295</u>		
Amendment to Name		
The amendment changes the formation document of the filing entity to change the article or provision that names the entity. The article or provision is amended to read as follows:		
The name of the filing entity is:		
<u>Bailey Peavy Bailey, PLLC</u>		

32. *Peavy was now entitled to a 10% interest in the firm, for all cases.* At this time, the Baileys agreed that Peavy's compensation would be increased to 10%—not just for the Paxil cases, but on the profits of the firm overall. This befitted his new role as a named equity member of the LLC, and his involvement in all of the firm's litigation endeavors beyond Paxil. Indeed, the Baileys were listing Peavy as counsel on almost all firm filings, regardless whether these were Paxil cases or not. Around this time, to reflect the demand of the Paxil litigation, the Baileys also increased the percentage recovery on the Paxil litigation to attorney Scott Allen, who was Of

Counsel, as opposed to being a “partner,” and who had also been working hard on the litigation with Peavy.⁵

33. Prior to and after becoming a named equity member in the firm, Peavy was heavily involved in multiple torts where the firm made significant profits above and beyond just the Paxil litigation. Millions of dollars were made on Avandia, PPH, Trasylol, Prozac, Wellbutrin, Celexa, Depakote, Depuy ASR, Wright Conserve, Stryker, State AG cases, Asbestos cases, Biomet and even individual personal injury cases—all of which generated tens of millions of dollars in settlements.

34. The Baileys agreed to make Peavy a 10% equity named member as an enticement for him to stay at the firm. He was well-known as a trial lawyer in the Paxil field, and lawyers began referring Paxil cases to him because of his experience and handling ability. The Baileys also added Peavy as counsel on other significant litigation (such as the Mesh litigation) because, if it had to go to trial, Peavy would be needed for that.⁶ And this agreement was a significant reason for Peavy to stay; otherwise, he could have gone elsewhere and brought in and developed pharmaceutical cases and other litigation without the Baileys.

35. *During this whole period of time, the Baileys were not sharing fees with Peavy, while claiming that they would make it up to him on future settlements.* Unfortunately, the

⁵ Reflecting a pattern and practice, the Baileys also stiffed Scott Allen out of amounts he was entitled to in the Paxil litigation. As of yet, however, Allen has not made claim in this litigation as to amounts justifiably owed him by the Baileys.

⁶ Scott Allen was named as counsel along with Peavy on many of these cases, reflecting their trial experience. When Scott Allen addressed the significance of being added as listed counsel on this other litigation, Bailey explained that this was an indication that the lawyers listed on the cases would be receiving compensation for fees on the case. As Ken Bailey explained: “Don’t complain unless you don’t want fees for the case.” Of course, the Baileys had a habit of not living up to these types of promises, it was later seen.

Baileys did not live up to their rosy promises and representations of income. Instead, the Baileys gave Peavy his same old draw, and told Peavy time and time again that his share of the firm's profits would be made up once the second round of Paxil cases settled, and also on pending Mesh and GM cases. During one of the meetings Peavy had with Ken Bailey, he agreed that Peavy would get his percentage taken care of through Mesh fees and GM fees the firm earned and that would make up for any shortfalls in Paxil. Ken's words were "I will make it up to you on Mesh," "You just need to keep hammering away on Paxil." In the meantime, the Baileys claimed the fees being earned were needed for the firm to help meet overhead and case expense costs.

36. ***The Baileys start diverting \$40 million in fees and take out \$20 million in loans to secretly benefit themselves.*** The Baileys' claim that the firm was barely covering overhead was not at all true. Little did Peavy know that, just months after becoming a named member, and being promised fees later to make up for a shortfall on overhead, the Baileys had taken out a loan in March 2014 with a company called Virage Master LP and borrowed against any and all future Paxil fees that were owed to BPB in the future. Apparently, the Bailey pocketed a loan of \$17 million for themselves against the Paxil litigation, and then compiled massive amounts of interest at 18-20%. This secret self-dealing and profiting only came to light in February 2018 when Virage made a demand on the settlement administrator for any fees coming from the Paxil litigation:

February 13, 2018

The Settlement Alliance, LLC
5847 San Felipe Street, Suite 4550
Houston, TX 77057

Re: Paxil, Irrevocable Letter of Direction for Bailey Peavy Bailey, PLLC
Multi-Plaintiff Loan Agreement with Series 2 – Virage Master LP

Dear Mr. Freeman,

We are writing in regards to Bailey Peavy Bailey, PLLC's Multi-Plaintiff Note 526 Loan Agreement, dated as of March 13, 2014, and all related documents thereto (the "Note") entered into by and between Bailey Peavy Bailey, PLLC as Borrower (the "Firm" or "Borrower") and Series 2 – Virage Master LP as the Lender ("Virage" or "Lender"). The Note is collateralized by a pledge of the amount of all funds received directly or indirectly by or on behalf of the

Note that this loan was with the Bailey PEAVY Bailey entity without ever disclosing this to their named-partner Adam Peavy. Who takes out a loan with someone else's name and affecting their interest and does not tell them about it while taking all the benefit and imposing all of the cost?⁷ They never even showed him the loan document in which his name as named-partner appeared, much less asked Peavy to sign the document or consent to it.

37. The Baileys had apparently burdened the Paxil litigation with liens for 50% of any recovery and 100% of any firm expenses:

⁷ This type of burdening of another's interest without full disclosure and pocketing of loan proceeds was deemed to be a clear and serious breach of a fiduciary duty in *Dernick Resources, Inc. v. Wilstein*, 471 S.W.3d 468 (Tex. App.—Houston [1st Dist.] 2015, pet. denied.), justifying exemplary damages, attorney's fees and fee forfeiture.

This letter shall serve as the Direction of Proceeds and an irrevocable instruction to you, as Administrator, to pay fifty percent 50% of any Recoveries and 100% of any expense reimbursements due to Firm to the deposit account set forth below (the "*Lender Account*"). No


38. Apparently, the Baileys (at least Ken that is known of) also took out separate personal loans in addition to the BPB loans on a variety of their dockets, including Mesh cases. This secret profiteering generated tens of millions of dollars in money pilfered by the Baileys, while burdening the firm with debt and liens on the Paxil and Mesh dockets, as well as potentially other dockets.

39. During this time, the Baileys also let Harris Junell leave the firm with a collection of the mesh cases that the firm had signed up over the years, many of which identified Peavy as a lawyer on the case, and for which the Baileys had promised Peavy fees to make up the Paxil shortfall. However, when those cases settled, the Baileys instructed Harris Junell to direct approximately \$40 million in fees to the Baileys personally.⁸ These were fees on which Peavy was entitled to compensation, and through which the Baileys promised that Peavy would be made whole. Instead, the Baileys profited personally—they did not even use this money to pay off their secret debts to Virage or for other secret liens on the firm's docket. Moreover, the Baileys apparently chose to burden the firm with the gross overhead on the Mesh litigation, and yet pocketed individually any benefits from the settlement of the Mesh cases. Once again, the Baileys chose to line their own pockets to the detriment of others.

⁸ To this day, Harris Junell claims to be "of counsel" at the firm: "Harris is the managing partner of Junell & Associates, PLLC. He is also serving as Of Counsel in the law firms of Bailey Peavy Bailey Cowan Heckaman, PLLC and the Potts Law Firm, LLP." See <http://www.junell-law.com/harris-junell/>.

40. *Despite failing to pay fees to Peavy, the Baileys make Peavy a 20% equity member in a newly created firm.* Still, Peavy was needed by the Baileys to make the litigation work, and as the 2014 year ended, the Paxil litigation ramped up considerably; Peavy was also involved in other litigation in which Peavy was named as counsel by the Baileys. To keep Peavy involved in all of the work that was expected of him, the Baileys agreed to form a new entity in which Peavy would have a 20% equity interest as a named member. Two other equity members were added, Robert Cowan and Aaron Heckaman, A new entity was then formed in December 2015 named Bailey Peavy Bailey Cowan Heckaman, PLLC, and from that point forward the firm signed up all of its cases under that entity name.

41. *The Baileys confirm Peavy's equity ownership in filings with the Texas Secretary of State for Bailey, Peavy, Bailey, Cowan, Heckaman, PLLC.* The Baileys followed through on registering this agreed to and formed entity, as reflected in an accepted filing with the Texas Secretary of State:

Form 206 (Revised 06/11) Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555 FAX: 512 463-5709 Filing Fee: \$300	 Certificate of Formation Professional Limited Liability Company	<small>This space reserved for office use.</small> FILED <small>In the Office of the Secretary of State of Texas</small> DEC 31 2015 Corporations Section
Article 1 – Entity Name and Type The filing entity being formed is a professional limited liability company. The name of the entity is: <u>Bailey Peavy Bailey Cowan Heckaman PLLC</u> <small>The name must contain the phrase "professional limited liability company," or an abbreviation of this phrase.</small>		

42. The new entity, referred to here as BPBCH, reflected that it was to be managed by its members:

Article 3—Governing Authority (Select and complete either A or B and provide the name and address of each governing person.)	
<input type="checkbox"/>	A. The professional limited liability company will have managers. The name and address of each initial manager are set forth below.
<input checked="" type="checkbox"/>	B. The professional limited liability company will not have managers. The company will be governed by its members, and the name and address of each initial member are set forth below.

43. This specifically include Peavy as an equity member with management authority:

2015-Dec-31 03:14 PM Bailey Perrin Bailey 713-425-7101				3/6	
GOVERNING PERSON 1					
NAME (Enter the name of either an individual or an organization, but not both.)					
IF INDIVIDUAL					
First Name	M.I.	Last Name	Suffix		
OR					
IF ORGANIZATION					
Adam D. Peavy PC					
Organization Name					
ADDRESS					
440 Louisiana St., Ste. 2100		Houston	TX	USA	77002
Street or Mailing Address		City	State	Country	Zip Code

44. The registration statement filed by the Baileys also reflected that BPBCH would be effective as of January 1, 2016:

Effectiveness of Filing (Select either A, B, or C.)

A. ☐ This document becomes effective when the document is filed by the secretary of state.

B. ☒ This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: January 1, 2016


C. ☐ This document takes effect upon the occurrence of the future event or fact, other than the passage of time. The 90th day after the date of signing is: _____

The following event or fact will cause the document to take effect in the manner described below:

Execution

The undersigned affirms that the person designated as registered agent has consented to the appointment. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized to execute the filing instrument.

Date: 12/31/2015



Signature of organizer

K. Camp Bailey

Printed or typed name of organizer

45. Of course, the Baileys had already agreed that BPBCH would be effective retroactive to the beginning of 2015, with respect to allocation of profits and losses.

46. *The Baileys' own writings and emails confirm Peavy's 20% ownership interest.*
The Baileys never got around to executing a company agreement for BPBCH. But the respective percentages were clear and agreed to. All of the equity owners met in a conference room for an entire day where the percentages of ownership were hammered out and agreed to and written on a whiteboard. Below is another writing from (and transmission from the Baileys to the transactional lawyer) reflecting an agreement for Peavy to have a 20% equity interest moving forward in BPBCH cases:

Exhibit B
Sharing Ratios


<u>Equity Member</u>	<u>Sharing Ratio</u>
F. Kenneth Bailey, Jr., P.C.	27%
K. Camp Bailey, P.C.	35%
Adam D. Peavy P.C.	20%
Aaron M. Heckaman PLLC	10%
Robert W. Cowan PLLC	8%
Total	<u>100%</u>

47. There are several emails from the members reflecting agreement on those percentages, and that they would be effective retroactive to the beginning of 2015.

48. This was effective to create the new PLLC with these respective ownership percentages. The Business Organizations Code does not expressly require LLCs to have a company agreement, See Tex. Bus. Orgs. Code Ann. § 3.001(c), (d) (providing that the LLC's existence begins when the certificate of formation becomes effective (i.e., upon its filing unless there is a delayed effective date), and the Secretary of State's acknowledgment of filing is conclusive evidence (except in an involuntary termination proceeding by the state) of the formation and existence of the LLC and that the organizers have complied with all conditions precedent to formation). The statute expressly recognizes that a company agreement may be written or oral. Tex. Bus. Orgs. Code Ann. § 101.001(1) (defining “company agreement” as “any agreement, written or oral, of the members concerning the affairs of a limited liability company”). Moreover,

"Writing" is broadly defined in the BOC to include electronic transmissions, which would include the Baileys' and other members' email confirmations that ownership interests had been established. Tex. Bus. Orgs. Code § 1.002(89).

49. The existence of and agreement for BPBCH was repeatedly recognized by the Baileys. The Baileys obtained a certificate of compliance for the entity with the Secretary of State:

<p>TEXAS COMPTROLLER of PUBLIC ACCOUNTS</p> <p>PO BOX 13822 • AUSTIN, TX 78711-3822</p>	
---	---

May 6, 2016

BAILEY PEAVY BAILEY CONAN HECKAMAN PLLC
440 LOUISIANA ST
HOUSTON, TX 77002-1639

CERTIFICATE OF ACCOUNT STATUS


THE STATE OF TEXAS
COUNTY OF TRAVIS

I, Glenn Hegar, Comptroller of Public Accounts of the State of Texas, DO HEREBY
CERTIFY that according to the records of this office



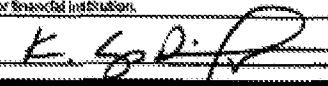
BAILEY PEAVY BAILEY CONAN HECKAMAN PLLC

has filed all required reports for taxes administered by the Comptroller
under Title 2, Tax Code, and taxes reported due on those reports have been
paid. This certificate must be filed with the Texas Secretary of State to
legally end the entity's existence in Texas. This certificate is valid
through December 31, 2016.

GIVEN UNDER MY HAND AND
SEAL OF OFFICE in the City of
Austin, this 6th day of
May, 2016 A.D.


Glenn Hegar
Texas Comptroller

50. The Baileys also filed public reports for BPBCH reflecting Peavy's ownership status as an equity member:

00032605265		Filing Number: 802368377	
 Texas Franchise Tax Public Information Report To be filed by Corporations, Limited Liability Companies (LLC), Limited Partnerships (LP), Professional Associations (PA) and Financial Institutions			
<input checked="" type="checkbox"/> Tcode 13196 Franchise			
Taxpayer number <div style="border: 1px solid black; height: 15px; width: 100%;"></div>		Report year <div style="border: 1px solid black; padding: 2px; text-align: center;">2 0 1 6</div>	
Taxpayer name BAILEY PEAVY BAILEY COWAN HECKAMAN PLLC			
Mailing address 440 LOUISIANA ST			
City HOUSTON	State TX	ZIP code plus 4 77002-1639	Secretary of State (SOS) file number or Comptroller file number 0802368377
<input type="checkbox"/> Blacken circle if there are currently no changes from previous year; if no information is displayed, complete the applicable information in Sections A, B and C.			
Principal office 440 LOUISIANA ST SUITE 2100, HOUSTON TX 77002			
Principal place of business			
You must report officer, director, member, general partner and manager information as of the date you complete this report.			
<i>please sign below!</i> This report must be signed to satisfy franchise tax requirements.		 1000000000015	
SECTION A Name, title and mailing address of each officer, director, member, general partner or manager.			
Name K. CAMP BAILEY PC		Title MEMBER	Director <input type="radio"/> YES Terms expiration <div style="border: 1px solid black; width: 40px; height: 15px;"></div>
Mailing address 440 LOUISIANA, SUITE 2100		City HOUSTON	State TX ZIP Code 77002
Name ADAM D. PEAVY PC		Title MEMBER	Director <input type="radio"/> YES Term expiration <div style="border: 1px solid black; width: 40px; height: 15px;"></div>
Mailing address 440 LOUISIANA, SUITE 2100		City HOUSTON	State TX ZIP Code 77002
Name F. KENNETH BAILEY, JR., PC		Title MEMBER	Director <input type="radio"/> YES Term expiration <div style="border: 1px solid black; width: 40px; height: 15px;"></div>
Mailing address 440 LOUISIANA, SUITE 2100		City HOUSTON	State TX ZIP Code 77002
SECTION B Enter information for each corporation, LLC, LP, PA or financial institution, if any, in which this entity owns an interest of 10 percent or more.			
Name of owned (subsidiary) corporation, LLC, LP, PA or financial institution		State of formation	Texas SOS file number, if any
Name of owned (subsidiary) corporation, LLC, LP, PA or financial institution		State of formation	Texas SOS file number, if any
SECTION C Enter information for each corporation, LLC, LP, PA or financial institution, if any, that owns an interest of 10 percent or more in this entity.			
Name of owned (parent) corporation, LLC, LP, PA or financial institution		State of formation	Texas SOS file number, if any
Registered agent and registered office currently on file (See instructions if you need to make changes)			
Agent: K. CAMP BAILEY		You must make a filing with the Secretary of State to change registered agent, registered office or general partner information.	
Office: 440 LOUISIANA ST		City HOUSTON	State TX ZIP Code 77002
The information on this form is required by Section 171.203 of the Tax Code for each corporation, LLC, LP, PA or financial institution that files a Texas Franchise Tax Report. Use additional sheets for Sections A, B and C, if necessary. The information will be available for public inspection.			
I declare that the information in this document and any attachments is true and correct to the best of my knowledge and belief, as of the date below, and that a copy of this report has been mailed to each person named in this report who is an officer, director, member, general partner or manager and who is not currently employed by this or a related corporation, LLC, LP, PA or financial institution.			
sign here 	Title MEMBER	Date 5/6/16	Area code and phone number (713) 425 7100

51. Tellingly, the Baileys caused K-1 statements to be issued for Peavy in tax years 2016 and 2017, reflecting his ownership interest through tax treatment.

52. *Peavy did just exactly what the Baileys needed—work up the litigation.* After BPBCH was established, Peavy (along with “of counsel” Scott Allen) continued to take countless

depositions all over the United States from plaintiffs, treating doctors, GSK employees and experts on both sides. The amount of work in this phase of the Paxil litigation was equal to or exceeded the amount expended in the prior settlement.

53. Peavy was involved in two trials that would ultimately lead to the global settlement of these cases, the first starting on March 22, 2016 in Philadelphia, and the second one in October 2016 in St Louis. Thousands of man-hours went into these two trials, and they are what ultimately led to a final settlement of virtually all of the remaining Paxil cases in the country.

54. *The Paxil settlement required Peavy to get approval from hundreds of clients—and the Baileys sure weren't going to do that.* By this point, almost every firm in the country with Paxil cases had referred these cases to Peavy and the firm, because it was the only firm litigating. Ultimately, there was a massive settlement, which took months of negotiation.

55. Needless to say, the work wasn't done. Just like in the first round, Peavy had to organize trying to meet hundreds of clients and their families to discuss the terms of the settlement and then get all the minor cases approved by a court. Over the course of several months starting in September 2017, Peavy had meetings in Houston, Los Angeles, San Francisco, Portland, Chicago, St. Louis, New Orleans, Tampa, Atlanta, Philadelphia and Boston. In some cases, Peavy made personal trips to a client's home where travel was difficult and in others Peavy did videoconferences and went over the paperwork in that manner. Besides Peavy and his associate (who was fired once the settlement was funded) not a single other partner at BPBCH attended a single meeting. Certainly, the Baileys had nothing to do with it. When Camp Bailey refused to spend time getting client approval of the mass settlement, leaving that all to Peavy, Camp tellingly admitted that none of the clients even knew him at all:

From: Camp Bailey
Sent: Thursday, February 08, 2018 5:28 PM
To: Adam Peavy <aapeavy@bpolaw.com>
Subject: Re: Closing letter

Who am I to these clients was my point. They've never heard of me...

56. Ultimately, after an exhausting effort, Peavy satisfied the master settlement requirement of getting over 97% of the plaintiffs to accept the settlement, which permitted funding.

57. *Once again, the Baileys start finding ways to milk money out of the settlement for their personal benefit.* Typical with past conduct, once fees came into play, the Baileys started their funny business with money and expenses. Initially, Peavy and his assistant started to prepare the closing statements that were consistent with the client's contracts or consents to associate for referring lawyers that were in the file. Despite not being involved at all in the litigation, Camp instead took over preparing closing statements⁹ in which the fees earned were set out, as well as the firm expenses that were to be charged against the client's recovery. Below is a typical closing statement prepared by Camp Bailey in 2018:

COURT APPROVED ATTORNEYS' FEES SUMMARY			
Contingency Fee Contract Rate:	40.0%	Total Attorneys' Fees:	
		Net Attorneys' Fees:	
Detailed Breakdown by Law Firm of Net Attorneys' Fees:			Allocated Fee:
Bailey Peavy Bailey Cowan Heckaman PLLC	80.0%		
K. Camp Bailey, PC	20.0%		
	100.0%		
COURT APPROVED REIMBURSABLE EXPENSES SUMMARY¹			

⁹ Camp Bailey also unilaterally took over finalizing the common expense assessment for all clients, and never shared his final calculations with Peavy (despite requests from Peavy), nor did he provide any detail or itemized backup for these numbers with the settlement administrator.

58. *Camp Bailey personally took 20% in phantom referral fees off of the top.* Notably, Camp Bailey skimmed off 20% of the fees for himself as a referral fee. This was a remarkable money-grab, as he conceded that he did not even know any of these clients:

From: Camp Bailey
Sent: Thursday, February 08, 2018 5:28 PM
To: Adam Peavy <aheavy@bpblaw.com>
Subject: Re: Closing letter

Who am I to these clients was my point. They've never heard of me...

These were fees that should have gone to the firm, from which Peavy would be entitled to compensation through his ownership interest.

59. Review of the client files reflect that the vast majority of the cases on which Camp Bailey received a referral fee were actually referred from or generated by someone else, not Camp Bailey.¹⁰ Ultimately, Camp Bailey skimmed an additional amount of approximately \$3 million in fraudulent referral fees.

60. *As to the \$46 million in fees and expenses due to BPBCH, the Baileys claim that it is all gone, but Peavy nevertheless continued to work hard to get the necessary client approval for funding.* After BPBCH was due to receive approximately \$46 million in fees and expenses in year 2018 for the Paxil litigation alone, the Baileys started warning Peavy that there was no money, and that the cases had not been profitable for the firm. Camp Bailey indicated: “BPBCH wasn’t going to make any money on Paxil.” Of course, that is because the Baileys had already stolen all

¹⁰ What Camp Bailey evidently did was to determine what firm cases did not otherwise have a referral fee for an outside lawyer, and then for those cases he globally “gifted” himself a self-serving and unjustified 20% referral fee.

of the fees and money. Nevertheless, even though the Baileys started saying that there might not be any money, Peavy nevertheless worked hard to obtain over 97% client approval so as to achieve funding, going on the road to 13 different cities and meeting with hundreds of clients in person.

61. *A realization of the Baileys' fraudulent scheme over the course of 2018—application of the discovery rule and fraudulent concealment.* Over the course of 2018, Peavy began learning of various ways in which the Baileys had defrauded him. In February 2018, Peavy learned of a lien notice asserted by Virage with the Paxil settlement administrator reflecting that the Baileys owed approximately \$23 million from a loan taken out on the Paxil docket for which 50% of the Paxil fees and 100% of the expenses had been pledged. In March 2018, Peavy learned that the Baileys had misstated the amount of the Paxil fees earned in the first round of settlement by \$12 million, thereby depriving him of compensation that he had earned. Peavy also learned that the Baileys had personally pocketed almost \$20 million each in Mesh settlement fees, while having applied the case expense and overhead to the firm. And it appeared that GM settlement fees were on the way, but that information had been withheld from Peavy. The discovery rule would apply in this instance, and likewise there would be a tolling on these claims because of the Baileys' active deceit and fraudulent concealment.¹¹ Nevertheless, the Baileys continued to string Peavy along with promises that they would take care of him, that they would make him whole and that he would get these fees.

¹¹ These factual allegations would trigger application of the discovery rule and fraudulent concealment. Regardless, if the Baileys seek to raise a limitations defense, they would have to conclusively negate the application of these tolling doctrines—which has been the law for the past 40 years. *Weaver v. Witt*, 561 S.W.2d 792, 794 (Tex.1977); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex.1988); *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999).

62. During 2018, there was a foreshadowing that the Baileys would not honor their obligations to Peavy. Ken Bailey repeatedly stated that the Baileys were in Peavy's debt and owed him compensation. Camp repeatedly offered Peavy money and admitted that Peavy was owed significant sums of money—even jokingly showing Peavy lottery tickets Camp had purchased saying that this would be needed to pay Peavy what he was entitled to. Ken promised to make Peavy whole from his own money. In the end, these were all empty promises and worthless representations. Nevertheless, Peavy worked hard to get the necessary client approval to achieve funding. Peavy even settled several hip cases that the Baileys did not know anything about, but ultimately the Baileys would not share any fees with Peavy.¹² While Peavy continued to work and showed a willingness to resolve these issues, Camp Bailey took advantage of the situation and spent his time with expensive fishing vacations to Madagascar, as well as many other expensive excursions, instead of working.

63. *The Baileys cut off Peavy, but still wanted to use his name and goodwill.* Ultimately, Peavy informed the Baileys that he would insist that they pay him fairly for the work he had done over the years. They refused every last chance to do right by him. They short-changed him on fees by millions of dollars, stopped his draw, and canceled his medical benefits. Now they claim that he is not even a member anymore, despite Tex. Bus. Orgs. Code § 101.107, which provides that “A member of a limited liability company may not withdraw or be expelled from the company.” The Baileys need to provide an accounting and make good on their obligations and misdeeds in winding up this entity, which still exists.

¹² Of course, Camp Bailey told Peavy that he would be getting half of these fees to make up for Peavy's disappointment in the claimed shortfall in funds to compensate him. But when Peavy reflected this payout on the settlement sheet, Camp reneged on his promise and gave him nothing.

64. The Baileys want to ignore these niceties of winding up, and just move on without Peavy, but still use his name, or profits on cases where his name appears on the contract and which were signed up by a firm in which he has an ownership interest. When Peavy complained that the Baileys still had Peavy's name on the door and on client contracts, the Baileys had the gall to say that they had the ongoing right to use Peavy's name under a long-changed 2010 agreement. Camp Bailey proclaimed: "With respect to the use of your name, you agreed in the company documents and our side agreement to allow us to use it beyond your departure." The Baileys are still making money off of client contracts with Peavy's name on them.

65. Peavy was involved in cases that generated hundreds of millions in fees for the firm, but the Baileys have cheated him out of the compensation he was owed—like so many other lawyers the Baileys have stiffed or cheated the past few years.

66. Because the Baileys have refused Peavy's repeated requests to make things right, Peavy now looks to this Court for redress. As this is a closely-held PLLC, Peavy is entitled to recovery in his own right¹³, and he has been personally and directly injured by the misconduct of the Baileys individually, with tortious conducted that the Baileys did individually. **Moreover, the claims asserted herein involve claims of fraud, breach of fiduciary duty, embezzlement, and defalcation, for which discharge is not permitted under the Bankruptcy Code. See 11 U.S. Code § 533.**

67. All conditions precedent, including notice, demand and presentment, have been complied with.

¹³ Tex. Bus. Org. Code § 101.463(c).

VI. CAUSES OF ACTION

A. **Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty.**

68. The Baileys owed Peavy a fiduciary duty, both formally and informally, and arising out of trust and confidence premised on prior commercial dealings in which such a duty existed.

69. The Baileys breached their fiduciary duty, by pocketing fees, taking out loans, impairing cases, while inducing Peavy to work steadfastly for their benefit.

70. ***Actual damages.*** This resulted in harm to Peavy for which actual damages are sought here, including fees and compensation to which Peavy was entitled. Peavy also seeks the recovery of mental anguish as damages, as a foreseeable result of the breach of fiduciary duty. *Douglas v. Delp*, 987 S.W.2d 879, 884 (Tex. 1999).

71. ***Disgorgement.*** The Baileys personally profited from the fees and other monies that they took in breach of the fiduciary duty that they owed to Peavy. Through the breach of their fiduciary duty, the Baileys should be made to disgorge any profits or benefits they obtained from fees or income from their breach of fiduciary duty. This remedy of disgorgement is equitable; it does not constitute a recovery of actual damages, and Peavy seeks this equitable recovery in addition to, not in lieu of, any recovery of actual damages. *See Saden v. Smith*, 415 S.W.3d 450 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (one satisfaction rule does not preclude dual recovery of actual damages and equitable remedies such as disgorgement or fee forfeiture).

72. ***Fee Forfeiture.*** In addition to the recovery of actual damages, Peavy also seeks the equitable recovery of fee forfeiture, for which the Baileys should be required to forfeit any fees paid to, consideration paid, or expenses reimbursed, as a consequence for their breach of fiduciary duty. This remedy of fee forfeiture is equitable, it does not constitute a recovery of actual damages, and Peavy seeks this equitable recovery in addition to, not in lieu of, any recovery of actual

damages. *See Saden v. Smith*, 415 S.W.3d 450 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (one satisfaction rule does not preclude dual recovery of actual damages and equitable remedies such as disgorgement or fee forfeiture).

73. ***Joint and Several Liability.*** The Baileys knowingly aided and abetted these breaches of fiduciary duty by each other, and are thus jointly and severally liability for any damages or recovery for breach of fiduciary duty. *See Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). This joint and several liability would extend to any equitable recoveries by Peavy. *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ denied).

74. ***Exemplary Damages.*** These actions were taken by the Baileys intentionally, and with malice, such that Defendants are liable for exemplary damages under Chapter 41 of the Texas Civil Practice and Remedies Code. Due to the Baileys’ misapplication of fiduciary property, these exemplary damages are not capped pursuant to Tex. Civ. Prac. & Rem. Code § 41.008(c)(10), and should be assessed on an individual basis.

75. ***Constructive Trust.*** A constructive trust should be placed on any proceeds or fees or monies received by the Baileys in breach of their fiduciary duty. This would extend to any properties acquired by the Baileys using funds from the Baileys’ malfeasance, including Camp Bailey’s mansion that is under construction. In addition, a constructive trust should extend to and be placed on fees held in trust prior to any distribution to the Baileys, such as settlement proceeds currently held up in Erath County in the Clayton Clark intervention, settlement proceeds held in trust by Harris Junell for Mesh cases in which fees are owed to Peavy, and fees held in trust by settlement administrator Scott Freeman on GM cases which are owed to Peavy. The Baileys claim to these fees in all of these instances is subject to Peavy’s claim of right. The Baileys would be unjustly enriched in benefitting from the breach of fiduciary duty to Peavy should any of these

fees be disbursed to the Baileys despite their fraud and breaches,¹⁴ and to the extent that these proceeds have been commingled, the Baileys have an affirmative duty to demonstrate what funds should not be placed under a constructive trust for the benefit of Peavy.

B. Statutory Fraud under Tex. Bus. & Com. Code § 27.01.

76. The agreements involving Peavy and the Baileys constituted transactions involving ownership interests in an entity. Accordingly, the Baileys are liable for statutory fraud under Tex. Bus. & Com. Code § 27.01.

77. The Baileys made false representations of fact and promise for the purpose of inducing Peavy to enter into agreements with the Baileys, and Peavy relied upon these misrepresentations and false promises in entering into each joint venture agreement.

78. In addition, the Baileys made these false promises with no intention of living up to their obligations.¹⁵

79. Through his reliance, Peavy detrimentally relied, which caused his damage, for which the Baileys are liable.

¹⁴ To the extent that any of these disputed interests and rights extend to the Baileys' interests and right in the subsequently formed Bailey Cowan Heckaman PLLC, a charging order should be issued as to any proceeds or distributions the Baileys might expect to receive from this newly formed PLLC pursuant to Tex. Bus. Org. Code § 101.112. As noted in *Goodman v. Compass Bank*, No. 05-15-00812-CV, 2016 WL 4142243, *11-12 (Tex. App.—Dallas Aug. 3, 2016, no pet.), no service of process is required to effectuate an application for a charging order, and the limited liability company need not be made a party to the proceeding in order to be bound by notice of the charging order.

¹⁵ Indeed, for purposes of statutory fraud, courts have held that the denial of an agreement to form an entity is evidence of a promise with no intent to perform for statutory fraud and exemplary damages. *Energy Maintenance Services Group I, LLC v. Sandt*, 401 S.W.3d 204,212 n.3 (Tex. App.—Houston [14th Dist.] 2012, pet. Denied) (“Tim's denial that he ever made a promise is a factor showing no intent to perform when Tim made the promise.”); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986); *W & F Transp., Inc. v. Wilhelm*, 208 S.W.3d 32, 48 (Tex. App.-Houston [14th Dist.] 2006, no pet.).

80. The Baileys each were actually aware of each other's misrepresentations and false promises, such that they knew that their actions were deceptive, false and/or unfair, yet did not disclose this to Peavy, causing him damages. The Baileys benefitted from the misrepresentations and false promises, as they had the benefit of Peavy's work and generated income and fees which they used to profit or recoup proceeds for themselves.

81. ***Actual Damages.*** Peavy is entitled to recover his actual damages, fees and compensation that he was entitled to under the agreements with the Baileys.

82. ***Additional, or Exemplary, Damages.*** The Baileys had actual awareness of the falsity of the misrepresentations and false promises concerning Peavy. Accordingly, the Baileys are liable for statutory additional damages as exemplary damages under Tex. Bus. & Com. Code § 27.01(c), (d).

83. ***Statutory Court Costs.*** In addition to the typical court costs awarded to a prevailing party, Peavy is entitled to recover from the Baileys all court costs, including expert and witness fees, pursuant to Tex. Bus. & Com. Code § 27.01(e).

84. ***Attorneys' fees.*** Peavy is entitled to recover from the Baileys his reasonable and necessary attorneys' fees, pursuant to Tex. Bus. & Com. Code § 27.01(e).

C. Fraudulent Transfer.

85. The Baileys are "affiliates" under Tex. Bus. & Com. Code § 24.002(1).

86. The Baileys are also "insiders" under Tex. Bus. & Com. Code § 24.002(7).

87. The Baileys have participated in transfers with the actual intent to hinder, delay or defraud the Peavy without receiving reasonably equivalent value for the community interests that were transferred or diminished, and which the remaining assets were unreasonably small in relation to the assets or interests transferred.

88. ***Rescission.*** The transfers engaged in by the Baileys were fraudulent and should be avoided pursuant to Tex. Bus. & Com. Code § 24.008(a)(1).

89. ***Other Equitable Remedies—Attachment, Injunction, and Receiver.*** In addition, the assets of the Baileys should be attached under Tex. Bus. & Com. Code § 24.008(a)(2), an injunction should be issued to prevent further disposition under Tex. Bus. & Com. Code § 24.008(b), and a receiver appointed to take charge of the transferred assets under Tex. Bus. & Com. Code § 24.008(c).

90. ***Money Judgment.*** The Baileys are also liable for a money judgment under Tex. Bus. & Com. Code § 24.009, which should be rendered for the value of the lost monies and interests due to the fraudulent scheme of the Baileys.

D. Breach of Contract.

91. The Baileys had a contractual obligation to provide compensation and fees to Peavy, which they breached.

92. ***Actual Damages.*** This failure to pay has proximately caused Peavy actual damages, for which he seeks benefit of the bargain or out of pocket expenses plus costs, as actual damages.

93. ***Attorneys' fees.*** The Baileys are liable for reasonable and necessary attorneys' fees, pursuant to Tex. Civ. Prac. & Rem. Code § 38.001.

E. Conspiracy.

94. The Baileys, each of them, were engaged in a civil conspiracy with unlawful purpose of defrauding Peavy, and had a meeting of the minds on this objective with a common purpose to deceive and to defraud Peavy.

95. The Baileys committed an overt act of fraud to further this purpose of defrauding Peavy, and as a result Peavy suffered damages,

96. As a result of this conspiracy, the Baileys are each jointly and severally responsible for the damages caused to Peavy.

F. Request for an Accounting and Appointment of an Independent Auditor

97. The Baileys were in charge of and assumed a management role in the calculation of expenses, fees and income, to which they owe a duty of accountability.

98. Accordingly, Peavy requests that the Baileys be caused to conduct an accounting of their affairs. In the alternative, Peavy asks for the appointment of an independent auditor under Tex. R. Civ. P. 172, to be taxed as costs against the Baileys and to be paid for by the Baileys, should they fail to render an accounting.

G. Common-Law Fraud

99. The Baileys made material misrepresentations to Peavy regarding his interests, his rights to payment and impairment of those rights.

100. These misrepresentations were a false statement of material fact made with knowledge of falsity or recklessly without any knowledge of truth and as positive assertion.

101. These misrepresentations were also the promise of future performance made with an intent at the time the promise was made not to perform as promised.

102. There were also misrepresentations through omission, where the Baileys had a duty to disclose facts regarding debts, liens and diversions for which they had a duty to disclose and intended Peavy to take action in continuing to work and to be bound to the Baileys in reliance.

103. The Baileys intended that Peavy rely on their misrepresentations, whether affirmative misrepresentations or misrepresentations by omission, and Peavy suffered injury in detrimental reliance.

104. ***Actual damages.*** The Baileys should be liable to Peavy for damages resulting from such fraud, including benefit of the bargain, lost profits, and reliance damages.

105. *Exemplary damages.* Due to the Baileys' intentional fraud and malice as to Peavy, the Baileys should be liable to Peavy for exemplary damages, each, severally, to the maximum extent permitted by law. Because the Baileys participated in a misapplication of fiduciary property, the award of punitive damages should be uncapped pursuant to Tex. Civ. Prac. & Rem. Code § 41.008(c)(10).

VII. JURY DEMAND

106. Pursuant to Rule 216 of the Texas Rules of Civil Procedure, Plaintiffs demand trial by jury and tenders the jury fee along with this filing.

VIII. REQUEST FOR DISCLOSURE

107. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Plaintiffs hereby request that you respond to items (A) through (L) no later than fifty-one (51) days from the service of this lawsuit.

XI. PRAYER

Plaintiffs Adam Peavy and Adam Peavy, PC respectfully pray that citation and notice issue as required by law and that the Court award them damages against the Baileys, including actual damages, statutory damages, additional damages, pre- and post-judgment interest, attorneys' fees, and court costs, including expert and witness fees. Plaintiffs also request equitable relief in the form of disgorgement, fee forfeiture as well as a constructive trust, attachment, receivership, and injunction, as requested herein. Plaintiffs also request that a charging order issue at the Baileys' interests, distribution or proceeds in Bailey, Cowan & Heckaman, PLLC pursuant to Tex. Bus. Org. Code § 101.112. Plaintiffs also request that an independent auditor be appointed under Tex. R. Civ. P. 172. Plaintiffs also pray for general relief.

Respectfully submitted,

A handwritten signature in black ink, reading "Alan B. Daughtry". The signature is fluid and cursive, with the first name "Alan" and last name "Daughtry" clearly legible.

ALAN B. DAUGHTRY

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